

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

DANNY FLEMMONS

PLAINTIFF

V.

CIVIL ACTION NO.3:07CV164-MPM-JAD

LEPHER JENKINS, et al.

DEFENDANTS

REPORT AND RECOMMENDATION

On May 14, 2008, plaintiff, an inmate housed at the Marshall County Correctional Facility, appeared before the court for a hearing pursuant to *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985) to determine if there exists a justiciable basis for his claim filed pursuant to 42 U.S.C. §1983.

The plaintiff underwent bunion surgery by Dr. Michael Whitmore, a podiatrist, that the plaintiff identifies as being with North Mississippi Foot Specialists in Oxford, Mississippi. The plaintiff testified that the shoes provided to him were too tight, resulting in the development of bunions. He states that an initial surgery in May of 2007 was unsuccessful. A second surgery was done to correct problems from the first surgery. He also reports that he developed an infection following a surgery.

He does not have a § 1983 action against the private physician. He does possibly have a claim for medical negligence so this portion of the claim should be dismissed without prejudice to allow him to pursue a state court action. With regard to the claims of too tight shoes and the post-surgical infection, Flemmons claim is at most a claim for simple negligence. The plaintiff has failed to show "deliberate indifference to a serious medical need." Estelle v. Gamble, 429 U.S. 97, 105-06, 97 S. Ct. 285, 292, 50 L. Ed. 2d 251(1976). The claims against Christopher Epps, Lepher Jenkins and Heather Ray should be dismissed.

It is recommended that the claim against Dr. Michael Whitmore should be dismissed without prejudice. The claims against the remaining defendants should also be dismissed with prejudice.

The parties are referred to 28 U.S.C. 636(b)(1) and Local Rule 72.1(C) for the appropriate procedure in the event any party desires to file objections to these findings and recommendations. Objections are required to be in writing and must be filed within ten days of this date. Failure to file written objections to the proposed finding and recommendations contained in this report within ten days from the date of filing will bar an aggrieved party from challenging on appeal both the proposed factual findings and the proposed legal conclusions accepted by the district court *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

Plaintiff is directed to acknowledge receipt of this report and recommendation by signing the enclosed acknowledgment form and returning it to the court within ten days of this date. Plaintiff is warned that failure to comply with the requirements of this paragraph may lead to the dismissal of this lawsuit under F.R.Civ.P. 41(b) for failure to prosecute and for failure to comply with an order of the court.

This the 20th day of May, 2008.

/s/ JERRY A. DAVIS
UNITED STATES MAGISTRATE JUDGE